E COPY

No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOANNE MAE SCHULTETUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys, Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	12
Conclusion	19

CITATIONS

Cases:

Indian Towing Co. v. United States, 350 U.S. 61 — 13

Sanders v. Leech, 158 F. 2d 486 — 19

United States v. Gypsum Co., 333 U.S. 364 — 19

United States v. Union Trust Co., 350 U.S. 907 — 12, 13, 14, 15, 16

Statutes:

Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. (1952 ed.) 401, *et seq.* — 4

Sec. 302(a)(4) — 4

Sec. 601(a)(7) — 4

Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.* — 4

Federal Tort Claims Act, 28 U.S.C. 1346(b), 28 U.S.C. 2671, *et seq.* — 2

28 U.S.C. 2680(a) — 13

562180 60 1

Miscellaneous:

	Page
Civil Air Regulations:	
14 C.F.R. 43.67	7
14 C.F.R., Part 60	4
14 C.F.R. 60.1, *et seq*	4
14 C.F.R. 60.2	5, 15
14 C.F.R. 60.30–60.33	6
14 C.F.R. 60.40–60.49	6
Federal Rules of Civil Procedure, 52(a)	12, 13, 17, 18

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 275

JOANNE MAE SCHULTETUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas (R. 894–908) is reported at 167 F. Supp. 239. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 27–40) is reported at 277 F. 2d 322.

JURISDICTION

The judgments of the court of appeals (Pet. App. 41, 43) were entered April 18, 1960. A timely petition for rehearing was denied on May 17, 1960 (Pet. App. 45). The petition for a writ of certiorari was filed on July 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the record in these actions against the United States under the Federal Tort Claims Act, the court of appeals erred in determining that the district court was clearly erroneous in finding federal air traffic controllers guilty of negligence which was the proximate cause of an aircraft collision.

STATUTE INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 28 U.S.C. 2671, *et seq.*, provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

These are suits against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, *supra*, arising out of the collision

two privately-owned light aircraft over Meacham Field, Texas, on April 9, 1957.[2] The district court found that the accident was caused by the negligence of Government air traffic controllers and awarded damages totalling $147,050.00 to the petitioners. On appeal by the United States to the Court of Appeals for the Fifth Circuit this judgment was reversed. Because the issues depend upon the particular facts in this record, a detailed statement follows.

The aircraft which collided were a Cessna 140 single-engine dual control trainer owned by Acro Enterprises, Inc., a flying school, and a Cessna 170 single-engine dual control trainer owned by American Flyers, Inc., which also is a flying school. In the 140 were instructor-pilot John Edward Senn and his student C. P. Champion (R. 118, 879). In the 170 were instructor-pilot J. Kenneth Schaitetus and his student Daryl Rattundo (R. 118). It is stipulated that the two instructors were responsible for their respective aircraft (R. 118). The collision occurred at approximately 12:42 p.m. (R. 346). The sun was shining out of the south at an elevation of 70° above the horizon (R. 961). The wind was from the south-east at 12 knots (R. 956). Both aircraft were totally destroyed and all four flyers were killed.

[2] Several of these actions were consolidated. The pre-trial order, trial transcript, certain exhibits and the depositions admitted in evidence in both cases appear in the two volumes of the record in C. A. 5, No. 17,712 hereinafter cited as R. ——, with the pleadings and judgment in that case. The pleadings, judgment in C. A. 5, No. 17,711 appear in a separate volume.

A. Principles of air traffic control

At the time the collision in question took place, civil aviation in the United States was regulated by the Federal Government under the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. (1952 ed.) 401. Under Section 601(a)(7) of the Act (49 U.S.C. (1952 ed.) 551(a)(7)), the Civil Aeronautics Board (CAB) is empowered to issue rules for the control of air traffic. Further to protect and encourage the development of civil aviation, the Civil Aeronautics Administrator is authorized "to provide necessary facilities and personnel for the regulation and protection of air traffic * * *." (Sec. 302(a)(4), 49 U.S.C. (1952 ed.) 452(a)(4).) Among the most important such facilities maintained by the CAA are airport control towers. There is such a tower at Mendota Field manned by CAA employees.

The duties and responsibilities of pilots of civil aircraft, whether in a control zone or not, are set forth in Civil Air Regulations issued by the Civil Aeronautics Board (14 C.F.R. 60.1, *et seq.*) (R. 717, 957-962), and in a CAA Flight Information Manual (R. 715, 952-957). The regulations are divided into parts each governing a specific aspect of civil aviation. The Air Traffic Rules (14 C.F.R. Part 60), as the title indicates, regulate flight traffic. These rules provide that the pilot in command of an aircraft is directed

---

[1] This Act was [illegible] by the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. (1958 ed.) 1301 et seq. The CAA has been [illegible] Administration, and the Administrator [illegible]

responsible for it and has final authority as to its operation. In an emergency requiring immediate decision and action, he may deviate from the rules (14 C.F.R. 60.2; R. 958).

It is the responsibility of personnel in the control tower to issue clearances and information to the pilots of aircraft to aid them to avoid collisions and to prevent unnecessary delays to aircraft using a landing area (R. 712, 963). When flying in conditions of clear visibility, regardless of flight plan or clearances, the Flight Information Manual provides that it is the direct responsibility of the pilot to avoid collision (R. 710, 713, 964). Clearances are permissive only; they do not relieve the pilot of his responsibility to exercise caution. They are issued when, "in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if the pilot exercises caution by the pilot" (R. 715, 964).

B. Meacham Field

Because the wind was from the southeast on the day of the collision, runway 13 (bearing 130°, southeast) was the runway in use for take-offs and landings (R. 147, 353, 371). Runway 13 is intersected by runway 17 (bearing 175°, south).

The traffic pattern. The traffic pattern for runway 13 is a rectangle flowing counterclockwise from and to runway 13 (see chart facing R. 938; R. 146-149, 354). An aircraft entering the field prior to landing flies this rectangular pattern at 6000 feet. An aircraft "practicing landings on runway 13 takes a left turn after take-off" to join the pattern at 6000 feet

the "crosswind leg"; climbs crosswind to 600 feet; then turns left on to course 310°, the "downwind leg." The downwind leg runs parallel to runway 13 at 600 feet. When the aircraft is sufficiently downwind of the end of runway 13 to permit a turn into a landing approach, it turns 90° left into the "base leg"; then turns left again into line with the runway, the "approach leg," and lands. In clear weather, flight operations about the airport are conducted by visual orientation under Visual Flight Rules (VFR). 14 C.F.R. 60.30–60.33. Aircraft operating on VFR need not be equipped with radio (R. 123, 167), and the Cessna 140 involved in the crash did not have one in operation (R. 587).

Instrument flight. Pilots of radio-equipped aircraft may bring their planes into a landing approach by navigating on instruments under Instrument Flight Rules (IFR) (14 C.F.R. 60.40–60.49). They are guided by radio signals continuously beamed in a fixed direction until they are near enough to the airport to begin a descending approach (R. 503). As they come to the end of this approach, they should be sufficiently close to the runway to orient themselves visually for a straight-in landing (R. 218–219). If the pilot wishes to abandon the approach, he advises the tower "missed approach" and executes a standard "missed approach" procedure. Meacham Field was equipped to receive instrument traffic on runway 17 only (R. 372). Under the standard procedure, an aircraft on instruments, after passing the radio range, comes in from the north on course 178°. In executing a "missed approach," it continues across the field over runway 17, still on course 178. (See chart facing

R. 932; R. 140–145, 454–455, 512, 544–549, 572–573, 678, 688). A pilot may not deviate from the course and altitude required by the standard procedure unless he is authorized to do so by the air traffic control center (R. 953).

In simulated instrument flight the pilot pretends he is in IFR conditions, but his aircraft is actually being oriented by visual contact under VFR (R. 550); a safety pilot sits in the plane for this purpose as required by 14 C.F.R. 43.67 (R. 507). When runway 13 is in use, cross-wind landings on runway 17 out of simulated instrument approaches are not contemplated; therefore, "missed approach" means only that the approach stage of the stimulated instrument maneuver is complete (R. 206–207).

C. The control tower

Traffic at Meacham is controlled from a tower approximately 70 feet from the ground (R. 133) from which three air-traffic control-tower operators observe traffic in the air and on the field, and from which they give clearances and information to pilots within the Meacham control area (R. 127–129, 933). Radio-equipped aircraft are contacted by radio (R. 746). Non-radio aircraft can be contacted only by colored light signals from a light gun aimed at the plane (R. 323–324, 739).

On the day of the accident the tower was manned by three CAA employees: Calvin Ellis, the senior controller (R. 128); James R. Collier, on the ground control position (R. 130); and Charles W. Selby, a trainee (R. 735). All three men had considerable

civilian or military experience in control towers (R. 126, 404, 735).

D. The collision

A few minutes before the collision, instructor-pilot Senn took off in a Cessna 140 to practice landings with his student (R. 567–568, 842, 845). There was a radio in the plane but it was not working (R. 587). The tower was not advised of his intentions (R. 592). After Senn had reached 400 feet and was ready to turn crosswind, a second Cessna 140, carrying George A. Schlarman and a student, Marvin Brown, took off (R. 839, 841). They, in turn, were followed into the air by a third 140, piloted by Pete B. Dennis, who was practicing solo flying (R. 257–258).

Meantime, in the Cessna 170, instructor-pilot Schultetus and his student, Rattunde, were approaching Meacham from the north (R. 149). Rattunde, a licensed pilot, was taking instruction in instrument flying. His visibility was, therefore, obscured to simulate actual instrument conditions. Although Rattunde was engaged in simulated instrument flight, his aircraft, under Schultetus' control, was actually operating under Visual Flight Rules (R. 550, 632). The instructor was required by the Civil Air Regulations to observe from his position on the right, which was not hooded, for all other aircraft (R. 507, 551, 696).

The 170 reported its position and requested clearance to make a simulated instrument approach (R. 149–150). At the same time controller Ellis observed that Senn's 140 was coming along the downwind leg of the pattern for runway 13 on course 310°, at 600 feet. He acknowledged the 170's report and cleared

it to make a simulated instrument approach with the warning that there was "traffic, Cessna 140 east of the field, downwind for runway 1–3" (R. 150, 334). The 170 was descending on course for runway 17 (R. 362). The normal speed for a plane of this type while making an instrument approach is 90 m.p.h. (R. 499, 619).

Schlarman and Brown, in the second 140, had flown an extended take-off leg so as not to interfere with Senn's operations (R. 274, 845). On Schlarman's instructions, Brown did not turn crosswind until Senn's plane was already coming back on the downwind leg (R. 289).

Pete Dennis, in the third 140, was following the regular pattern for runway 13 (R. 260).

The 170 was now a mile and a half north of the field when controller Ellis called it again, "5–9 Victor, traffic, Cessna 140 downwind east of the field for runway 1–3. Do you have him in sight?" (R. 152, 334). Ellis and the two other men in the tower heard the 170 respond "Roger, have him in sight." (R. 152, 363, 740). Senn's 140 was now downwind of the tower at 600 feet. Ellis did not consider it necessary, in the circumstances, to give the 140 a general warning light or a "give way" light, because the 170 said it had him in sight, and because Ellis did not know whether the 140 would stay in the pattern (R. 325). When the 170 was about six-tenths of a mile from the end of Runway 17, at 400 feet, some 200 feet below and to the left of Senn's 140, it suddenly began a climbing left turn (R. 334, 365, 744, 900). Simultaneously it transmitted "missed approach." A light signal was

not then given to the 140 because it had its tail to the tower; the signal was unlikely to be seen (R. 326). Instead, Ellis again warned the 170, "5–9 Victor, traffic, Cessna 140 crossing in front of you." Ellis heard it acknowledge (R. 154, 334). Suddenly the aircraft collided, separated, and started to fall. The 170 had struck its right side against the 140, coming from beneath (R. 377, 491, 865, 882). The final warning had been given between 10 and 15 seconds before the crash (R. 185, 366).

E. Proceedings in the district court and in the court of appeals

The beneficiaries of the two instructor pilots who were killed filed actions against the United States and the flying schools which owned, respectively, the 140 and 170. The schools claimed against each other and the United States, which in turn cross-claimed against them for indemnity or contribution. A workmen's compensation insurer also intervened as subrogee of one of the pilots (Pet. App. 28–29).

After a three-day trial, the district court entered findings of fact and conclusions of law absolving the instructor pilots of any negligence or contributory negligence, and finding that the proximate cause of the accident was negligence of the CAA personnel in the control tower (R. 894–908). In general findings the court described the facilities, communications between the tower and the aircraft, and movements of the planes prior to the collision (R. 895–901). From these it made special findings as to negligence (R. 901–904), namely: that the tower operators failed

to warn the 170 that there were two or more 140's on a converging or collision course with it and failed to identify which 140 they were referring to; that they failed to instruct the 170 to alter course to avoid collision; that they failed to warn the 140 by light signals of the 170's presence, and failed to instruct it by light signal to give way; and, finally, that they failed to maintain proper control over the two aircraft so that they would be properly spaced in the traffic pattern.[3]

Upon appeal to the Court of Appeals for the Fifth Circuit, the judgment of the district court was unanimously reversed as being clearly erroneous. The court concluded that, on the record in this case, the evidence did not support the determination that the control tower operators had been negligent. Under the Air Traffic Rules "the direct and primary responsibility for the operation of aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft * * *. We do not say that cases may not arise where the United States will be liable by reason of negligence of control tower operators for damages arising from the collision of aircraft. We are convinced that this is not such a case. Those findings of the district court which we decide are clearly erroneous, were either without substantial evidentiary support or based upon misapprehensions of the effect of the evidence." (Pet. App. 38–39.)

[3] Traffic controller Ellis was in charge of communications with aircraft in flight, but the district court also found that the other operators should have warned him or the aircraft of the imminence of collision (R. 901–903).

ARGUMENT

Both of the aircraft involved in the collision were actually operating under Visual Flight Rules in perfect flying weather under a mid-day April sun. In those conditions, the instructor-pilot of each aircraft had direct responsibility to avoid collision with other aircraft and to exercise reasonable caution in complying with permissive clearances from the control tower (R. 954). This allocation of responsibility is not only a matter of government regulations but also a matter of practical necessity. In this case, as the district court and court of appeals both found, the 170 made a left turn up and into the path of the other aircraft after the tower had warned it about the other plane.[1] On these facts, the court of appeals correctly held that the district court misconceived the responsibility of the pilots and thus misapprehended the effect of the evidence. Its decision on the facts of this record does not conflict with this Court's holding in *United States* v. *Union Trust Co.*, 350 U.S. 907; or with the decision of the Court of Appeals for the District of Columbia Circuit in that case, 221 F. 2d 62. It is a correct application of the standards for appellate review set forth in F.R. Civ. P. 52(a). There is thus no occasion for this Court to grant further review of the questions raised by the petitioners.

1. (a) *United States* v. *Union Trust Co.*, 350 U.S. 907, did not hold, as the petitioners assume, that

[1] In the court below, the United States argued that the 170 was guilty of contributory negligence, but the court of appeals did not have to reach this issue (Pet. App. 40). If certiorari is granted, the United States reserves the right to urge this defense.

primary responsibility for the operation of aircraft over an airport rests upon men on the ground rather than the pilot in the air. The petition for certiorari was limited to the question of whether the United States was shielded from liability under the Tort Claims Act for alleged negligence of its control tower operators, either under an implied "governmental function" immunity, or under the express "discretionary function" limitation in 28 U.S.C. 2680(a). Petition for Certiorari, No. 296, October Term 1955, p. 2. This issue was parallel to the questions presented in *Indian Towing Co.* v. *United States*, 350 U.S. 61, submitted during the same term. As the *per curiam* order at 350 U.S. 907 indicates, all that was decided when the judgment of the court of appeals was affirmed was that the blanket immunity from liability claimed by the Government for control tower negligence was not available. Nothing was considered by this Court concerning the facts or the allocation of responsibility between pilot and control tower.

The court of appeals in *Union Trust* not only considered the defenses of immunity raised by the United States, but also whether the district court's findings could be sustained under F.R. Civ. P. 52(a). The court concluded that there was testimony in the record which, if believed, would permit a finding that the collision involved was caused by control tower personnel at Washington National Airport, who cleared two aircraft to land on the same runway at the same time. There was no question of primary responsibility as between pilot and control tower.

Both aircraft in *Union Trust* had radios in operation and could be immediately given detailed instructions; neither aircraft was in a position to see the other; and there was a conflict in the testimony concerning the warnings issued by the tower to the pilots, which the trier resolved against the Government. The court of appeals simply held that, in the circumstances, there was sufficient evidence to support a determination of affirmative negligence.

But the facts here are entirely different. In this case, both courts found that the control tower issued a clearance which simply authorized the 170 under VFR to pass over the field (not to land) in a "simulated" instrument approach. This clearance was accompanied by radio warnings of other traffic; these warnings precisely identified the type of aircraft ("Cessna 140"); its general location ("east of the field") and its course and altitude in relation to the prevailing traffic pattern ("downwind for runway 1-3")[5] (R. 150, 152, 334, 899). At the start of the 170's simulated approach the aircraft were in a

[5] There were two 140's which had taken to the air a few minutes after the one involved in the collision. The second 140 had flown an extended take-off leg so as not to interfere with the 140 to which the tower's warnings referred; this aircraft did not even turn crosswind from its extended leg until the first 140 was already coming back on its downwind leg (R. 289). Thus, it was still southeast of the field—not east of it—when the warnings were given the 170. The third 140 only reached the downwind leg as the collision occurred (R. 261-264), so it could not have been the 140 to which the tower was referring in its warnings to the 170. The evidence is undisputable therefore that the 170 was accurately advised by the tower of the nature and location of its traffic, *i.e.* the 140 east of the field on the downwind leg for runway 13.

position to see each other; but only one plane, the 170, could be given precise warnings by radio. These warnings were acknowledged, and the 170 had only to hold its authorized course and altitude over the field to avoid the 140. Instead, without prior clearance from the tower, its pilots changed course and made a left turn up and into the 140. The tower personnel had no reason to anticipate such maneuver. During the brief time between its start and the resulting collision, the chief operator had to make an instant decision and to take instant action. In the emergency created by the 170's change of course, he chose to repeat the warning to it. A light signal to the 140 was very unlikely to be seen because the 140 already had its tail to the tower; and, even if seen, would not have told its pilot that an aircraft was coming up from beneath its left front.

The unsuitability of this case for review here is emphasized by the petitioners' argument that, as a factual matter, this case is like *Union Trust*. The foregoing discussion shows the error of this contention. In any event, the main issue on the merits here would be whether the particular record in this case contains evidence of the same effect as the particular record in *Union Trust*. This is not an issue of law, but an issue of fact of no general significance whatever.

(b) It must also be noted that the decision below—unlike that of the district court—is fully supported by the pertinent and controlling Civil Air Regulations (14 C.F.R. 60.2), and Flight Information Manual.

The Manual, a practical guide for pilots, provides (R. 954):

> When flying in visual flight rule weather conditions (regardless of the type flight plan or air traffic clearance), it is the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions. In this connection a clearance issued by a tower (such as "cleared to land") either by radio or visual signal is permissive in nature and does not relieve the pilot from exercising a reasonable degree of caution in executing the provisions of the clearance. However, such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint *if reasonable caution is exercised by the pilot.* [Emphasis added.] (R. 954.)

Assignment of primary responsibility for operation of their aircraft to the pilots is not, as the petitioners suggest, an "archaic notion" (Pet. 23). It is based upon a necessary and obvious practical consideration—the tower can only advise pilots, it cannot fly their planes for them. Even the power to advise is sharply restricted when the aircraft is not radio-equipped. Since tower personnel do not have physical control of the aircraft they regulate, every warning, every clearance, every affirmative instruction, depends for its effectiveness upon the skill and prudence of the pilots who actually fly the aircraft. The tower can warn of approaching traffic, but if that warning is not heeded,

it is helpless except to repeat the warning; it may grant a safe clearance but if that clearance is made unsafe by a pilot's lack of caution, it can only issue emergency warnings and hope that the pilot can recover from his negligence in time to avoid collision. There is no remote control system by which tower men in their glass cage on the ground can physically direct the movements of aircraft. The whole system of traffic control depends upon the intervening element of the pilot.

The petitioners suggest that the sharply rising volume of civil air traffic compels a shift of operational responsibility from pilot to control tower (Pet. 23). The traffic control experts of the agency designated by Congress to regulate aerial traffic believe that the same reason compels the opposite result (Flight Information Manual, *supra*, p. 16). And every rational consideration confirms the view that safety is not encouraged by absolving pilots from the responsibility of exercising due care.

As the court below recognized (Pet. App. 39), it can no longer be disputed that the United States—in a proper case—may be liable for the negligence of its tower personnel. *United States* v. *Union Trust Co.*, 350 U.S. 907. But both justice and sound policy require that the substantive findings of negligence rest on a basis of fact. Otherwise, the United States will be forced to stand as an insurer in every aircraft collision over every large airport in the country.

2. The decision of the court of appeals correctly applies the standards for appellate review set forth in F.R. Civ. P. 52(a). At trial, the evidence de-

veloped was not so much concerned with conflicting versions of what happened as with determining the proper standard of care which the control tower and the deceased flyers should have exercised in the operations preceding this particular collision. The Government's appeal did not dispute the district court's general findings, except as they related to the propriety of the 170's fatal change of course—an issue not reached by the court of appeals (Pet. App. 40)—and to the position of the second 140. It was primarily the special findings, holding the established actions of the control tower personnel to be negligent, which were in issue. In reversing, the court of appeals did not question the district court's findings as to the movements of the aircraft and the actions of the tower personnel; indeed, it sustained the sole finding on the aircrafts' positions which the Government challenged (Pet. App. 34). But it correctly concluded that the district court misconceived the effect of the evidence because it "had an erroneous concept of the functions and duties of the operators of the control tower" (Pet. App. 35). And to this was added the court's unanimous conviction that the established facts would not admit of a well-founded determination of negligence.

Rule 52(a) adopts the former equity practice for appellate review of a trial court's findings. "The findings were never conclusive—[and could be set aside as] 'clearly erroneous', when although there is evidence to support [them] the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United*

States v. *Gypsum Co.*, 333 U.S. 364, 395; *Sanders* v. *Leech*, 158 F. 2d 486 (C.A. 5). This is, of course, the standard which was properly applied in this case (Pet.App. 33).

CONCLUSION

No conflict of decision is involved here. Nor does the case present any question of general importance deserving review. All that is involved is that the court below concluded that the district court's factual findings are not supportable within the four corners of the present record.

It is therefore respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys.

AUGUST 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960